Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Qwest Communications International, Inc.	)	**WC Docket No. 02-189**
	)	
Consolidated Application for Authority To Provide In-Region, InterLATA Services in Montana, Utah, Washington and Wyoming	)	

REPLY OF TOUCH AMERICA, INC.

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Table of Contents

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REPLY OF TOUCH AMERICA, INC.

Pursuant to the Public Notice issued in the above-referenced proceeding, Touch America, Inc. ("Touch America") hereby replies to the initial comments filed in response to the Consolidated Application ("Application") of Qwest Communications International, Inc. ("Qwest") for authority to provide in-region, interLATA services in the States of Montana, Utah, Washington and Wyoming.

I. INTRODUCTION AND SUMMARY

As described in the initial comments in this proceeding, Qwest has not only failed to meet the requirements of the Telecommunications Act ("Act"), but has shown itself to be so cavalier with the law and its competitors that its Application must be denied. Qwest's recent announcement that it had incorrectly applied its accounting policies to certain optical capacity and equipment transactions during 1999 through 2001, thereby possibly requiring revenue adjustments of up to $1.16 billion, has a significant impact on this proceeding that must not be ignored by the Commission. Through its announcement, Qwest admits that its "lit capacity IRU" agreements are service contracts, not the "asset sales" of facilities that Qwest has purported to hold them out to be and, therefore, that Qwest has been prematurely providing in-region, interLATA services through such agreements. Qwest should not be rewarded for such conduct by granting it the authority it seeks under the very statute that it has just admitted to have been violating all along.

Further, as the comments demonstrate, inordinately high UNE rates coupled with Qwest's anticompetitive activities have resulted in a paucity of competitive commercial local exchange activity in the States of Montana, Utah, Washington and Wyoming. Given this lack of commercial activity, Touch America's two-year history with Qwest is particularly telling of the manner in which Qwest will conduct its activities outside of the "test" environment – the only true environment existing today. As set forth in Touch America's initial comments, Touch America's experience makes clear that the Application must be denied. Indeed, the initial filings demonstrate that Touch America's experience with Qwest is being borne out in the local exchange market as Qwest, among other things, is precluding competitive local exchange carriers ("CLECs") from access to the information and systems that they need to serve their customers and delivering to CLECs wholly inaccurate and inadequate wholesale bills.

Moreover, the litany of anticompetitive and unlawful conduct by Qwest mandates denial of the Application. Qwest's efforts to silence its critics through secret, unlawful agreements and provide itself with an unlawful "jump-start" in the long distance market cannot be tolerated. Continued oversight and enforcement of Qwest will not rein in Qwest's predilection to skirt the law and its obligations to competitors. Qwest must be made to comply with the law now, not after it receives 271 authority. Indeed, if it approves this Application, the Commission may establish a new standard of "271-lite" – *i.e.*, just how little a Bell Operating Company ("BOC") must show, and how much the Commission is willing to overlook, in granting 271 authority. At a minimum, the Commission must require Qwest to divest itself of its in-region, interLATA assets prior to permitting Qwest into the long distance markets, and require Qwest to submit to a genuinely independent and comprehensive audit for the purpose of ensuring Qwest's proper divestiture of such assets.

II. ARGUMENT

A. Qwest's admission that it has been violating section 271 for the past 2 years mandates denial of the Application.

As set forth in the initial comments and other materials filed in this proceeding, as well as Touch America's complaints pending before the Commission,[1] Qwest has been violating section 271 for at least two years through its so-called "lit capacity IRU" agreements.[2] Although Qwest contrived the euphemism "lit capacity IRU" in an effort to disguise its efforts to circumvent the proscriptions of section 271 – and tried to hold out such services as "asset sales" – Qwest provides nothing more than the transmission of prohibited in-region, interLATA "telecommunications" through its "lit capacity IRU" agreements. However, assuming, *arguendo*, that Qwest's "IRU" argument is relevant, Qwest's recent announcement that it has improperly booked certain capacity (IRUs) as asset sales when they should have been booked as

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1 *See* File No. EB-02-MD-003 (alleging Qwest's sale of "Capacity IRUs" are in essence long-distance voice and data telecommunications services that specifically violate section 271) ("*IRU Complaint*") and File No. EB-02-MD-004 (challenging Qwest's compliance with FCC Merger and Divestiture Orders and alleging Qwest has violated or is presently violating sections 201, 202 and section 271 of the Telecommunications Act of 1996, by engaging in unreasonable and discriminatory activities and failing to fully divest its long-distance business and cease providing in-region long distance services) ("*Divestiture Complaint*").

2 *See, e.g.,* Comments of AT&T Corp. ("AT&T Comments") at 140-43. Indeed, Qwest's provision of lit capacity IRUs was confirmed by its own auditor, Arthur Andersen. *See* Letter from Arthur Andersen LLP to Dorothy Attwood (June 6, 2001), Finding 7 ("14 in-region service component codes tested related to IRUs").

services[3] is an unequivocal admission by Qwest that it is violating section 271 and therefore compels the denial of this Application.

As Qwest makes clear in its Accounting Announcement under the heading "Optical Capacity Sales" (*i.e.*, lit capacity), it has "incorrectly applied" its "revenue recognition policies" to such sales. Continuing, Qwest then states that a correct application would result in a decrease in revenues which "would be partially offset by the amounts that would be recognized over the lives of the Agreements if the optical capacity asset sales were instead treated as operating leases or services contacts."[4] In other words, Qwest will no longer recognize its lit capacity sales as assets but, instead, will recognize them as services. As correctly concluded by AT&T, "there can be no claim by Qwest now that the lit fiber IRUs can be considered asset sales for purposes of section 271."[5]

In response, Qwest only acknowledges that it has failed to maintain its books, records and accounts in accordance with GAAP, as required by section 272(b)(2) of the Act and as previously represented by Qwest in its Application.[6] Qwest completely ignores the changeover to its position that what it had heretofore argued were IRU asset sales are now services. In fact, Qwest merely states the following conclusion:

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[3] Qwest Communications Provides Current Status of Ongoing Analysis of Its Accounting Policies and Practices (July 28, 2002) ("Accounting Announcement").

[4] *Id.* at 2.

[5] *See* Letter from Mark D. Schneider, Sidley Austin Brown & Wood LLP to Marlene Dortch dated August 15, 2002 at 2 ("AT&T *ex parte* Letter").

[6] Letter from Oren G. Shaffer, Vice Chairman and Chief Financial Officer, Qwest Communications International Inc., to Marlene Dortch dated August 20, 2002 at 1-2 ("Qwest's *ex parte* Letter"). Qwest also addressed its admission in its Reply Brief in the *IRU Complaint* proceeding by ignoring the clear impact of the Accounting Announcement and stating that nothing therein says that "IRUs are services." File No. EB-02-MD-003, Qwest's Reply Brief at 35 (filed August 16, 2002). Qwest also states that nothing in the Accounting Announcement says that network capacity was "improperly booked as IRUs when they should have been booked as services." *Id.* As shown above, nothing could be further from the

> The GAAP issues identified here do not implicate the Act's concerns regarding improper cost allocation, cross-subsidization and discrimination. As a result, these matters do not affect Qwest's showing that the requested authorization will be carried out in accordance with the requirements of Section 272. *Similarly, these matters do not implicate QC's compliance with the market-opening obligations under Section 271*.[7]

Contrary to Qwest's unfounded assertions, the fact that it now admits that the "lit capacity IRUs" are services is also an admission that it is and has been violating section 271, which is wholly relevant to the analysis of its application.[8] In fact, the Commission has found that a BOC cannot satisfy the 271 "public interest" standard where there is evidence that the BOC has failed to comply with federal law.[9] The fact that Qwest admits that it is violating the very statute under which it seeks relief is not only relevant, it mandates denial of the Application. The Commission must require Qwest to fully divest itself of its in-region, interLATA assets and customers before allowing Qwest to properly enter the in-region, interLATA market and require Qwest to submit to a genuine and comprehensive independent audit of Qwest's divestiture actions. As put by AT&T, "[t]he Commission should deny outright Qwest's applications and

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truth. The Accounting Announcement clearly makes this admission.

7 Qwest's *ex parte* Letter at 2 (emphasis added).

8 This assumes, of course, that the dichotomy between IRUs and services has any value under 271. Section 271 prohibits in-region, interLATA services, which are defined under the Act as "telecommunications" which, in turn, is defined as the "transmission" of information. Thus, it does not matter whether an offering is an "IRU" or a "service"; it only matters that it is a "transmission." As defined by Qwest in the agreements by which it provides "lit capacity IRUs," "'Capacity' means the digital transmission capability of a given portion of the Qwest Network designed to transmit signals…" *See* IRU Complaint, Exhibit S. It is clear, therefore, that Qwest is providing prohibited "in-region, interLATA services," *i.e.*, in-region, interLATA transmissions.

9 *See Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Service in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order at ¶ 297 (rel. Aug., 19, 1997) ("*Michigan 271 Order*"); *In the Matter of Application by Verizon New Jersey, Inc. for Authorization to Provide In-Region, InterLATA Services in New Jersey*, WC Docket No. 02-67, Memorandum Opinion and Order, FCC 02-189 at ¶ 190 (rel. June 24, 2002).

make clear to Qwest that future filings will not be considered unless and until Qwest cures its ongoing violations of section 271(a)."[10]

B. The filings in this proceeding clearly demonstrate that the absence of any commercial testing of Qwest's OSS and Touch America's "real life" experience with Qwest compels a finding that the Application must be denied.

The initial comments in this proceeding demonstrate that inflated UNE rates and Qwest's reluctance to meet its obligations under the Act have resulted in a dearth of competitive commercial activity in the Qwest region.[11] As illustrated by WorldCom, assuming that Qwest's data is correct, in May 2002, Qwest processed at most 6,000 UNE-P orders via its EDI ordering interface, as compared to other BOC regions, where WorldCom alone often submits 3,000-5,000

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[10] AT&T's *Ex Parte* Letter at 2-3. Touch America expects that Qwest will claim that complaints pending before the Commission in other dockets should not be litigated in a section 271 docket. *See In the Matter of Qwest Communications International Inc. Consolidated Application for Authority to Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska and North Dakota*, Reply Comments of Qwest Communications International, Inc. at 126, n. 100 (filed July 29, 2002) (citing *Georgia/Louisiana 271 Order,* 17 FCC Rcd. 9018 at ¶¶ 207-08). However, the decisions on which Qwest's relies for its position are wholly inapposite to the instant matter. In the *Georgia/Louisiana* decision, the Commission declined to consider a dispute involving an intercarrier compensation issue, as that issue was being addressed in a pending rulemaking proceeding, as well as individual, fact-specific disputes related to the BOC's obligations to specific carriers. *Georgia/Louisiana Order* at ¶¶ 208-09. In this case, Touch America demonstrates, and Qwest admits, that it is providing in-region, interLATA services in violation of section 271. There is no more fundamental analysis of whether a carrier meets the requirements of a statute than if the carrier is violating that very statute. The Commission must therefore consider Qwest's 271 violations in the context of this proceeding, even if, in the past, it has declined to consider more tangential, carrier-specific issues in the 271 context. *C.f. Kansas/Oklahoma 271 Order* at ¶ 230 (the Commission declined to consider in the 271 context a carrier's dispute related to collocation of the fiber distribution frame).

[11] *See* Comments of WorldCom, Inc. ("WorldCom Comments") at 2-3 (explaining how Qwest's over-inflated UNE rates and OSS deficiencies delayed WorldCom's entry into the Qwest region); AT&T Comments at 147-50 (describing how, after adjusting for Qwest's over-inflated estimates, UNE-based competitors serve less than 1/10 of 1% of residential lines in three of the four states, with only 24 residential lines in Montana, 183 lines in Utah and 1,668 lines in Washington); Comments of OneEighty Communications, Inc. at 6-7 (demonstrating that the small degree of local competition in Montana shows that Qwest has not opened its markets). *See also* Evaluation of the United States Department of Justice ("DoJ Comments") at 9 ("the lack of [competitive] entry may reflect, in part, the higher UNE pricing that was in effect for most of the period preceding this application").

UNE-P orders *per day* in individual states.[12] Although Qwest has clearly inflated the data supporting its Application,[13] even the 81,000 stand-alone loops that Qwest claims to have provisioned throughout the 4-state region[14] pales in comparison to the 164,000 stand-alone loops that Verizon had in place a year ago in the State of Pennsylvania alone to support its 271 application,[15] and even the 80,000 loops that BellSouth had provisioned in the State of Georgia at the time it filed its application for that state.[16] Indeed, according to Qwest's own data, Qwest has provisioned only 3,121 stand-alone loops throughout the States of Montana and Wyoming.[17]

As explained by WorldCom, Qwest relies primarily on third-party testing of its OSS.[18] Given the absence of any real commercial testing of Qwest's OSS in connection with Qwest's Application, Touch America's two-year history with Qwest is particularly telling of how Qwest will conduct itself outside of the test environment. Touch America's experience, which unfortunately is being borne out by the CLECs in their limited commercial activity in the Qwest region, compels the denial of Qwest's Application.

As detailed more fully in Touch America's initial comments and its *Divestiture* and *IRU Complaints* pending before the Commission, Qwest has continually abrogated its obligations to Touch America and obstructed Touch America's efforts to serve its customers in an effort to

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12 WorldCom Comments at 1-2.

13 *See* Comments of Sprint Communications Company L.P. at 12 (although Sprint has withdrawn from the local voice market and has no stand-alone UNE loops, Qwest nevertheless attributes approximately 78,000 competitive access lines to Sprint in the four states); AT&T Comments at 148-49 (explaining how Qwest's use of an E911 database to estimate CLEC line counts is inaccurate and the interconnection trunk multiplier it uses to estimate facilities-based lines is too high).

14 Qwest's Application at 61.

15 *See In the Matter of Application of Verizon Pennsylvania, Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd. 17419, 17462 (2001).

16 *See In the Matter of Joint Application by BellSouth Corporation for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, 17 FCC Rcd. 9018, 9144 (2002).

17 Qwest Application at 62 and 72.

place itself in a superior position once it obtains 271 authority. Among many other things, Qwest denies Touch America access to the databases and systems it needs to serve its customers and fails to provide accurate or complete information to Touch America.[19] Qwest's actions to wrongfully limit Touch America's access to databases and information, prevents Touch America from providing even the most basic customer care to its customers.[20] Qwest has also provided Touch America inaccurate and wholly inadequate bills. Qwest's bills grossly overstate costs and fail to provide industry-standard billing detail, thereby foreclosing Touch America from effectively verifying its costs and revenues and forcing Touch America, at its cost, to engage an independent consulting firm to sort out Qwest's bills.[21]

Touch America's experience is indicative of the conduct that competitors can expect once they enter the market and really begin to compete against Qwest and is therefore relevant to the Commission's analysis.[22] As discussed below, the initial comments in this proceeding demonstrate that CLECs operating in the Qwest region – albeit on a limited commercial basis – are experiencing the same types of problems, particularly those related to billing and access to Qwest's systems and databases, which have plagued Touch America for the past two years.

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[18] WorldCom Comments at 4.

[19] *See, e.g.*, Affidavit of Carol Giamona ("Giamona Affidavit") (filed with the Commission in connection with Touch America's *Divestiture Complaint*, File No. EB-02-MD-004).

[20] *Id*. at ¶¶ 3-29.

[21] *Id*. at ¶¶ 48-71.

[22] *See In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd. 3953, 3980-82 (1999); *Application of Verizon New England Inc For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd. 8988, 9094-95 (2001); *Michigan 271 Order* at ¶¶ 15-16.

1. Similar to Touch America's billing problems, the record in this proceeding is replete with examples of Qwest providing inaccurate and inadequate wholesale bills.

In order to receive 271 authority, a BOC must demonstrate that it provides competitors with "complete, accurate, and timely wholesale bills" that provide competitors a meaningful opportunity to compete.[23] Further, the Department of Justice ("DoJ") has made clear that "[a]ccurate and auditable electronic bills are an important factor in making local telecommunications markets fully and irreversibly open to competition."[24] The initial comments demonstrate, however, that Qwest not only fails to provide auditable electronic bills which, in itself should compel denial of the Application,[25] but that its bills are replete with erroneous and unsupportable charges, thereby requiring CLECs to expend significant resources to reconcile and dispute the charges.

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23 *See Application of Verizon New Jersey Inc. (d/b/a Verizon Long Distance) for Authorization to Provide In-Region InterLATA Services in New Jersey*, WC Docket No. 02-67, Memorandum Opinion and Order, FCC 02-189, ¶ 121 (rel. June 24, 2002).

24 *In re: Application of Verizon Pennsylvania, Inc., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, Evaluation of the U.S. Department of Justice, FCC Docket No. 01-138 (July 26, 2001).

25 Although Qwest introduced a proprietary, auditable electronic bill system on July 1, 2002, this system has not yet been independently tested and therefore cannot be relied upon by Qwest to meet its obligations to CLECs. *See* WorldCom Comments at 20 ("[a]lthough Qwest announced on July 1 that it is now providing CABS BOS bills, its process has not yet been tested either by CLECs or by a third-party tester, much less used commercially"); AT&T Comments at 46-47 (Qwest's use of non-industry-standard billing format renders CLECs unable to audit Qwest's wholesale bills, as it is prohibitively expensive and time-consuming to attempt to use paper bills to verify the accuracy of Qwest's bills). The DoJ concluded that it does not have sufficient evidence to determine the feasibility of using commercial technology to audit Qwest's wholesale bills electronically. *See* DoJ Comments at 16. If the Commission were to grant Qwest's Application prior to ensuring the efficacy of the auditable electronic billing system, the 271 "carrot" to ensure that the system works disappears and CLECs are left with a deficient billing system. Indeed, the DoJ noted that, when Verizon initiated its auditable electronic bill system several years ago, Verizon encountered numerous problems with its initial deployment. See DoJ Comments at 15, n. 72. AT&T has already experienced problems with the electronic bills that Qwest has provided to AT&T since July 1, 2002, even after Qwest resubmitted them to correct flaws that it acknowledged. *See* AT&T Comments at 47, n. 139; DoJ Comments at 15, n. 72. CLECs operating in the Qwest region should not be required to work through these problems while Qwest is busy increasing its revenues through long

For example, WorldCom has found that "[t]he CRIS bills that Qwest has been providing . . . are entirely inadequate . . . [t]he bills lack detail information WorldCom needs to audit the bills . . . ." [26] As a result of these billing deficiencies and the obvious lack of internal checks on Qwest bills, WorldCom already has been forced to open billing disputes with Qwest for hundreds of thousands of dollars.[27] Similarly, AT&T describes how "Qwest's wholesale bills to AT&T have persistently contained errors, most of which have continued to appear in AT&T's bills even after months of discussions between Qwest and AT&T to correct the errors."[28] AT&T has found that, in certain instances, Qwest failed to return more than 40 percent of the DUFs (Daily Usage Files) that it was required to send and committed errors on more than 30 percent of the access DUFs that AT&T actually received.[29] As a result of Qwest's untimely and inaccurate DUFs, CLECs are unable to decipher and reconcile important data and usage information and are therefore precluded from providing effective customer care service and accurate end-user billing.

Eschelon Telecom also experiences the burden of Qwest's inadequate and anticompetitive billing practices. For instance, Qwest fails to provide Eschelon circuit identification information or the date of the dispatch or trouble repair in Eschelon's maintenance and repair bills, thereby foreclosing Eschelon from auditing the bills for accuracy.[30] Although

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distance service offerings.

[26] WorldCom Comments at 20-21.

[27] *Id*. at 21.

[28] *See* AT&T Comments at 47. For example, AT&T has found that Qwest's bills for its UNE-P offering contain long distance charges when the IXC is other than AT&T, fail to provide details of debit and/or credit adjustments at the account level, and fail to include an explanation or definition of special service charges. Qwest also bills long distance charges on an individual call basis, rather than on the appropriate minutes-of-use basis. *Id*.; Finnegan/Connolly/Menezes Declaration ¶¶ 266-67.

[29] AT&T Comments at 46.

[30] *See* Comments of Eschelon Telecom, Inc. ("Eschelon Comments") at 27. Eschelon also notes that because Qwest's maintenance and repair bills contain charges going back several previous months,

Eschelon believes that circumstances exist when Qwest wrongfully charges Eschelon, the insufficient and untimely information provided by Qwest prevents Eschelon from being able to establish Qwest's wrongful billing.[31] In addition, Qwest also fails to provide Eschelon customer loss information that accurately and clearly identifies which customers have left Eschelon for another carrier, thereby resulting in double billing of certain customers and the consequent loss of reputation and goodwill.[32] As a result of Qwest's inaccurate and untimely wholesale bills, Eschelon has more than $2.2 million in outstanding billing disputes with Qwest, and its billing disputes have gone unresolved for several months.[33]

These billing problems are not surprising to Touch America, as they are typical of those that Touch America has experienced over the past two years. Like these CLECs, over the past several years, Qwest has provided Touch America wholly inadequate and patently erroneous bills, depriving Touch America of the ability to properly monitor and verify its network and operational costs and bill its customers. Moreover, similar to these CLECs, Qwest's discriminatory billing practices have the effect of damaging Touch America's relationship and reputation with its customers or would-be customers.

These billing problems should also come as no surprise to the Commission, as KPMG reported that it was unable to determine whether (1) Qwest has in place an internal process for validating bill accuracy; (2) Qwest complied with cycle-balancing procedures to resolve out-of-balance conditions or whether Qwest uses sufficient reasonability checks to identify errors not

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"[b]ill verification becomes virtually impossible." *Id*. at 26-27.

31 *Id*. at 27.

32 *Id*. at 30.

33 *Id*. at 35. Eschelon also finds that once billing disputes are resolved in a CLEC's favor, Qwest's performance results are not adjusted to reflect the resolution. *Id*.

susceptible to pre-determined balancing procedures; (3) Qwest has procedures to ensure that payments and adjustments are applied when errors are identified; or (4) Qwest ensures that bills are retained for a sufficient length of time so that CLECs can challenge them.[34] Touch America can assure the Commission that, in its experience, Qwest lacks internal processes and will continue to render wholly inadequate and inaccurate wholesale bills.

As a result of Qwest's billing deficiencies and the impact of these problems on competitors, the DoJ concluded that it was "unable to endorse Qwest's application on the existing record."[35] The DoJ recommends, however, that the Commission carefully examine whether these billing problems have been addressed sufficiently to alleviate these concerns.[36] The record makes clear that these billing concerns are not resolved and, therefore, that the Application must be denied. That is, Qwest fails to meet the Commission's requirement for "complete, accurate, and timely wholesale bills" and, consequently, its Application must likewise fail.

2. Consistent with Touch America's experience, Qwest is providing its competitors discriminatory and inadequate access to Qwest's databases and systems and frustrating competitors' efforts to obtain information necessary to serve customers.

The initial comments demonstrate that the problems experienced by Touch America in obtaining access to Qwest's databases and information are likewise being replicated in the local exchange marketplace. Similar to the manner in which Qwest refused to provide Touch America access to the information it needs to serve its customers, Qwest fails to provide CLECs with nondiscriminatory access to its LFACS system and all other databases that contain loop

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34 WorldCom Comments at 21.
35 DoJ Comments at 17.

qualification information.[37] For example, the "loop qualification tools" that Qwest provides do not provide CLECs with all of the information to which Qwest has access.[38] As a result, Qwest fails to provide CLECs nondiscriminatory access to the loop qualification and loop make-up information that competitors need to offer their desired services.[39] Qwest, of course, provides itself with full access to loop qualification information, thereby providing itself an unlawful competitive edge.

In addition, in much the same way that Qwest precludes integration among, and reasonable access to, the Qwest databases by Touch America, Qwest does not offer CLECs the ability to successfully integrate pre-ordering and ordering interfaces.[40] This lack of integration results in Qwest wrongfully rejecting a high percentage of CLEC orders, thereby requiring CLECs to incur the costs and expend the time to reconcile and resubmit its orders.[41] In addition, Eschelon demonstrates that Qwest's GUI OSS interface is cumbersome and difficult to use.[42] Qwest's refusal to provide CLECs with simple ordering processes and uniform business rules comports with Touch America's experience.

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36 *Id*.

37 *See* AT&T Comments at 41. As AT&T points out, when a BOC has compiled loop qualification information for itself, "it is required to provide requesting competitors with nondiscriminatory access to the loop information within the same period of time frame." *Id*. at 41, n. 99 (citing *Georgia/Louisiana Order* at 9075).

38 AT&T Comments at 41. *See also* Comments of Covad Communications Company ("Covad Comments") at 24-28 (explaining the manner in which Qwest fails to provide CLECs with nondiscriminatory access to all loop makeup information available in Qwest's databases and systems).

39 Covad Comments at 26.

40 *See* AT&T Comments at 39-40 (noting that Qwest presents no "real-world" evidence that CLECs using EDI have attained successful integration and that even the third-party tester (HP) confirms that a CLEC would find it unreasonably difficult, if not impossible, to integrate EDI pre-ordering and ordering functions successfully). *See also* WorldCom Comments at 4-10.

41 *See* WorldCom Comments at 9-10; AT&T Comments at 39-42.

42 *See* Eschelon Comments at 18-19.

Further, the comments demonstrate that Qwest's order flow-through rate is abysmally low, requiring Qwest to manually process a substantial number of CLECs orders.[43] WorldCom reports that, even with the low volume of commercial orders, Qwest flowed through only 51% of UNE-P orders submitted via EDI.[44] AT&T computes that, depending on the type of order and the interface used, between 25 and 62 percent of all electronically submitted LSRs in Qwest's region are manually processed by Qwest.[45] Manual processes are more prone to "error," or at least designations of "error," thereby negatively impacting the provisioning of CLEC orders.[46] In Touch America's experience, the incorporation of the human element into the process also permits Qwest the opportunity to make mischief by revising information at will, creating new rules of the game, and obfuscating explanations upon inquiry.

In fact, the "quality" of Qwest's manual processing – in terms of timing and accuracy – is wholly substandard. Even in the test environment, KPMG continued to find errors in Qwest's processing of manual orders *after* Qwest had supposedly instituted employee training and monitoring to correct previously-revealed deficiencies. Notwithstanding KPMG's finding, Qwest declined to retest the accuracy of its manual processes, likely worried about what such results would reveal. Indeed, Qwest's manual handling of orders can only become worse in the future when the scalability of the process is tested by increased volumes of orders at the same

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43 *See* WorldCom Comments at 8-10; AT&T Comments at 41-44.

44 WorldCom Comments at 15. As WorldCom explains, "[u]nlike in other regions, Qwest does not have sufficient commercial experience to show that it can process orders manually without difficulty as ordering volumes increase significantly . . . [i]ndeed, Qwest has not even shown it can do so with low order volumes." *Id*.

45 AT&T Comments at 42.

46 *See id*. at 42 ("[m]anual processing, by nature, increases the likelihood of delays and errors in provisioning."). *See also* Eschelon Comments at 7 ("Qwest relies heavily on manual handling, and manual handling results in many errors that either adversely affect Eschelon's end user customers or increase Eschelon's costs, or both"); WorldCom Comments at 16 (indicating that KPMG found that

time that Qwest is faced with implementing staff and training cost reductions as a result of the downturn in the telecommunications arena.

The DoJ brushes off these concerns on the hope that Qwest will improve its performance in the future. For example, while finding that Qwest's order reject rates continue to be high, the DoJ notes that two changes Qwest made to its order processes effective August 15 "is a positive development that should improve the performance of its OSS."[47] Similarly, the DoJ recognized that the performance data that Qwest had originally produced related to manual service order accuracy were an "imperfect representation of Qwest's performance" in that, while the initial data suggested Qwest's manual service order accuracy in processing resale and UNE-P orders for April through July was 97 percent, the new data showed that it actually ranged from 84 to 90 percent.[48] However, the DoJ indicates that Qwest implemented a system enhancement on August 17 that will improve Qwest's accuracy to 95 percent.[49] Touch America submits that the effect of supposed "enhancements" and "modifications" made by Qwest a matter of days prior to the submission of the DoJ's evaluation and weeks before the Commission is statutorily required to render its decision on the Application is nothing more than conjecture and surely cannot support approval of the Application.[50]

In fact, as made evident by its refusal to comply with the directives of the Wyoming Public Service Commission ("Wyoming PSC") regarding its performance assurance plan

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manual processing led to numerous errors that affected the accuracy of performance reporting.)

[47] DoJ Comments at 11-12.

[48] *Id*. at 12-13.

[49] *Id*. at 13.

[50] Indeed, the system enhancements will likely require some time for implementation. *See*, *e.g*., WorldCom Comments at 11 (indicating that the earliest the "migration as specified" enhancement announced on August 15th will be implemented is April 2003).

(referred to as "QPAP"), even Qwest does not think that it will meet its performance obligations to its competitors in the future. Although directed twice by the Wyoming PSC to revise its QPAP in order to remedy critical anticompetitive defects as identified by the Wyoming PSC, Qwest has refused to comply with the Wyoming PSC's directives.[51] For instance, Qwest proposes an "unfair, complex and administratively burdensome cap on its liability under the QPAP" and limits the Wyoming PSC's ability to review the cap.[52] The Wyoming PSC therefore found that Qwest's proposed QPAP provides an incentive for protracted lapses in conforming behavior and, as a result, that Qwest's competitors "could find it challenging even to survive until sufficiently protracted behavior triggered the weak 'remedy' envisioned by Qwest's proposal."[53] Also according to the Wyoming PSC, Qwest's proposed QPAP provides a narrowly available and complicated process to delay or block a competitor's access to federal court by forcing the competitor to pass a QPAP test and obtain "permission" to go to federal court.[54] Further, contrary to the Wyoming PSC's directives, Qwest seeks to limit the Wyoming PSC's continued oversight and review of Qwest's performance, refuses to remove limits on the escalation of Tier 1 payments and otherwise attempts to limit its financial liability for failing to meet its performance obligations.[55]

As explained by the Wyoming PSC, "[u]nderstood in the context of Wyoming's local service markets and the relatively small local exchange carriers competing with Qwest in Wyoming, Qwest's QPAP, as filed with the Commission and previously disapproved by the

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51 Comments of the Wyoming Public Service Commission ("Wyoming Comments") at 11-16.
52 *Id.* at 11.
53 *Id.*
54 *Id.* at 12.
55 *Id.* at 12-15.

Wyoming PSC, fails in several critical aspects to serve its intended purpose."[56] Clearly, Qwest would not put up such a fight over the conditions required by the Wyoming PSC if it believed that it would meet its obligations to its competitors in the future. Otherwise, these QPAP issues would be moot. The Commission should therefore cast a wary eye over Qwest's QPAP and its future intentions with respect to meeting its obligations to competitors. In Touch America's experience, Qwest will use every avenue available to shirk its obligations and backslide on its promises.

In sum, Touch America's "real life" experience with Qwest is indicative of the manner in which Qwest will conduct itself outside of the "test" environment. When Qwest is placed under the microscope – in the 271 test environment or in connection with the Commission's scrutiny of Qwest's merger with U S WEST and divestiture of its in-region, interLATA assets – Qwest will make any commitment to obtain the regulatory relief it seeks. When left to its own devices in the commercial marketplace, however, Qwest will turn a blind eye to its obligations and run roughshod over its competitors. The limited commercial activity in this proceeding makes clear that Qwest is on its way to repeating its pattern in the local exchange marketplace and must be stopped before the residents of the States of Montana, Utah, Washington and Wyoming are denied the benefits of competition at all levels.

C. Qwest fails third-party testing of its OSS by failing to meet parity and "declining" to fully test its OSS after deficiencies were revealed.

Given the lack of any real commercial testing of Qwest's OSS and the fact that Qwest's third-party test results include the data of CLECs who entered into secret deals with Qwest,

56 *Id*. at 10.

heightened scrutiny of the third-party tests is required.[57] As demonstrated by the initial comments, heightened scrutiny results in a finding of non-compliance, as Qwest, in certain material instances, either failed to meet parity or "declined" to retest its OSS subsequent to system and process modifications required when deficiencies were revealed.[58]

Despite the fact that the parties agreed on "military-style" testing by the Regional Oversight Committee, which requires retesting until passed, Qwest failed to fully retest its performance in certain instances where the OSS testing revealed deficiencies.[59] That is, in some instances where deficiencies in Qwest's OSS were revealed by the test administrator, Qwest claimed that it implemented a modification to its systems or conducted staff training to remedy the deficiency, but then "declined" to retest to ensure that the system modification or training was properly implemented. As a result, there is no way to ensure the efficacy of Qwest's correction or, therefore, whether Qwest's OSS meets the requisite standard.

In sum, although Qwest is relying almost exclusively on third-party test results, it fails to meet the parity requirements and refuses to fully test key performance issues in the test environment. A finding of OSS operational readiness surely cannot follow and the Application should be denied.

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57 *See, e.g.*, WorldCom Comments at 4 ("[b]ecause Qwest lacks such [commercial experience], the Commission should scrutinize the third-party test results very closely").

58 *Id*. at 13 ("KPMG found that Qwest did not install non-dispatch orders for the Pseudo-CLEC within a time period in parity with Qwest's retail operations for UNE-P services or business POTS services") and 22 ("the third-party tester did not determine that Qwest's change management process is adequate . . . [i]ndeed, the change management process was still being designed at the time that KPMG performed its testing"). *See also* AT&T Comments at 48.

59 WorldCom Comments at 4; AT&T Comments at 48 (citing Finnegan Performance Data Declaration at ¶¶ 85-99).

D. The substantive and procedural infirmities surrounding the proceeding and Qwest's premature entry into the long distance market mandate denial of the Application.

More so than any other 271 application, the filings in this proceeding establish a litany of anticompetitive and wrongful activity by Qwest, much of which has the effect of silencing opposition or directly impacting the reliability of the record in the proceeding. Further, while Qwest was silencing its critics, it was also quietly engaging in the very conduct prohibited by the statute under which it now seeks relief. Taken, *in toto*, the only reasonable finding is that the Commission must deny the Application.

1. The record in the proceeding is incomplete because it fails to fully reflect the concerns of competitors due to Qwest's secret, unlawful buy-offs.

The lack of competitors filing initial comments in this proceeding may best illustrate the anticompetitive effects of the "secret" agreements that Qwest bargained for in exchange for this very silence.[60] Qwest's secret pacts call into question the reliability of the performance data relied upon by Qwest in this proceeding as well as the question of whether the record genuinely reflects competitors' experience in the Qwest region. As stated by AT&T, the evidence demonstrates that Qwest bought the silence of CLECs that have additional information bearing on Qwest's checklist compliance and, even apart from the issue of CLEC participation in section 271 proceedings, the performance and other test data upon which Qwest relies is therefore skewed by preferential treatment of particular CLECs.[61]

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[60] Approximately 36 carriers filed initial comments in the New York 271 proceeding. In comparison, only approximately 12 competitors filed in this proceeding, although, according to its Wholesale Volumes Data Report Summary filed with its Application, even in the State of Montana, certainly a state with a minimal amount of competition, Qwest identifies 36 facilities-based CLECs to which it provides service. *See* Exhibit DLT-TRACK A/PI-CO-1 (Montana Wholesale Volumes Report Summary – Facilities Based).

[61] AT&T Comments at 27 (explaining that Eschelon has confirmed that it was prevented by its

In fact, McLeod USA ("McLeod") filed comments in this proceeding that confirms that it had an oral agreement with Qwest, in which McLeod agreed to remain neutral on (neither support nor oppose) Qwest's 271 applications as long as Qwest was in compliance with all of its "unfiled" side agreements with McLeod.[62] McLeod indicates that it was compelled to file comments in this proceeding, notwithstanding having maintained its neutrality heretofore pursuant to its agreement with Qwest because, according to McLeod, Qwest is no longer performing under the underlying side agreements.[63] As explained by McLeod, "Qwest performed under [its agreements with McLeod] until it was effectively too late for McLeod to assert its rights in a manner that could be meaningfully considered in the context of Section 271."[64]

The Commission need not look any further than these statements to determine that the record in this proceeding is deficient and Qwest's Application must be denied. In fact, according to Qwest's own disclosures, Qwest has 18 secret agreements in the applicable four-state region "that have one or more provisions that are presently in effect related to Section 251 interconnection." [65] The number of secret agreements is therefore greater than the number of

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secret agreement with Qwest from providing evidence regarding Qwest's failure to comply with the Act in section 271 proceedings). *See also* Comments of Pilgrim Telephone, Inc. ("Pilgrim Comments") at 3 (Qwest cannot demonstrate that it has complied with its OSS obligations because the data submitted in connection with tests of Qwest's OSS have been tainted by discriminatory "secret agreements" that gave certain competitors advantageous OSS access and skewed any data applicable to those competitors).

62 *See* Comments of McLeodUSA Telecommunications Services, Inc. ("McLeod Comments") at 2.

63 *Id*. at 2.

64 *Id.* at 5. *See also* Pilgrim Comments at 5-7 (explaining that Qwest failed to perform under its agreements with Eschelon, ultimately leading Eschelon to terminate its agreements – including the agreement not to oppose Qwest's 271 applications – but, by the time of termination, Eschelon's ability to participate in Qwest's 271 process was seriously eroded as the state commissions' review of the applications were nearing completion).

65 *See* Letter from Peter A. Rohrbach to Marlene Dortch dated August 13, 2002.

carriers submitting comments in this proceeding, and does not even account for those agreements that Qwest entered into that have expired or terminated.

Notwithstanding the mounting evidence of blatant discriminatory treatment, the DoJ off-handedly dismissed the effects of the secret agreements on the record in this proceeding[66] yet ultimately states that, "[i]f the Commission finds that a violation has occurred, sanctions may be appropriate and could include suspension or revocation of any Section 271 authority that the Commission may have granted in the interim."[67] The DoJ therefore defers to the Commission's assessment of whether Qwest's failure to file these agreements violated Section 251 or 252.[68]

The secret agreements, particularly those in which competitors agreed to abstain from opposing Qwest's 271 applications – the existence of which are now beyond dispute[69] – requires the Commission to deny the Application. The record in the proceeding has been skewed by Qwest's surreptitious conduct and the Application therefore cannot stand.[70] At minimum, the Commission must refrain from acting on the Application until it determines the lawfulness of Qwest's actions. Requiring Qwest to refile its 271 application after the Commission renders a decision on the lawfulness of the secret agreements is not unreasonable and is in the best interests of the public because it is in the best interests of competition. Trying to undo the approval of the Application at some later date is a much more unpalatable and unworkable

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[66] DoJ Comments at 3, n. 6 (essentially incorporating its evaluation from Qwest's first consolidated 271 application, FCC Docket No. 02-148, submitted July 23, 2002).

[67] DoJ Comments at 3.

[68] *Id*. at 3, n.6.

[69] *See, e.g*., AT&T Comments at 19-25; McLeod Comments at 2.

[70] *See* Letter of Arizona Corporation Commissioner Jim Irvin to All Parties, Docket Nos. RT-00000F-02-0271 & T-00000A-97-0238 (June 27, 2002) (requiring the suspension of Qwest's 271 application until the resolution of the "secret" agreements matter).

solution and therefore is not highly likely to be the result even though, as the DoJ indicates, it could be the right result.

In addition to the impact of Qwest's secret pacts on the record in this proceeding, Touch America and AT&T have each been denied true *ex parte* meetings with the Commission. In connection with Qwest's first 271 application, the Commission informed Touch America and AT&T that, as a result of Touch America's pending *Divestiture* and *IRU Complaints*, they would be required to permit Qwest to attend the *ex parte* meetings. In fact, not only was Qwest permitted to attend Touch America's meeting, but it was given equal time during the one-hour meeting to respond to Touch America's concerns. By requiring Touch America to permit Qwest to participate in Touch America's *ex parte* meeting, the Commission chilled the *ex parte* process, precluding Touch America from a frank discussion of the issues germane to the proceeding.[71] The Commission's efforts to stifle Touch America are particularly troubling given the lack of participation in the proceeding by competitors due to the declining financial climate and the silence that Qwest bought with its secret pacts.

In sum, the existence of the secret agreements and the restricted *ex parte* process calls into question whether the record accurately and fully represents the interests of all parties. These substantive and procedural infirmities alone compel the denial of the Application.

2. *Qwest has "jumped the gun" in providing 271 services, while impeding local competition.*

The filings demonstrate that Qwest has done everything it could to sneak its way into the in-region, interLATA market prior to receiving authority to do so while, at the same time,

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[71] Because Touch America's concerns with regard to the instant proceeding are similar to those it raised in connection with Qwest's first application, Touch America presumed that the same *ex parte*

devising schemes to impede local competition. Through its unlawful and anticompetitive actions, Qwest is trying to begin the long distance race half-way around the track. Qwest must not be permitted to "jump the gun," but must be made to come back to the starting gate where it belongs before being granted the right to enter the in-region, interLATA market. Qwest must also be made to fully comply with its obligations to its competitors.

For instance, in an effort to perpetuate its stranglehold on local competition, Qwest implemented a local service freeze (*i.e.*, a "lock" on the customer's choice of local exchange carrier, intended for the purpose of combating slamming problems).[72] Qwest initially defended its local freeze policy as a consumer protection initiative. However, it became clear under questioning that Qwest was solely intending to make it more difficult for customers to switch local service so that, when Qwest received 271 authority, it could swoop in and become the customer's full service provider. Consequently, the Iowa Utilities Board ordered Qwest to cease its practice of freezing local service changes[73] and the Nebraska Public Service Commission issued a moratorium on the use of such a freeze until Qwest provided evidence of the need for the freeze.[74] Not to be dissuaded, Qwest has persevered in attempting to institute local freezes in other states.[75] Described by AT&T, as a result of Qwest's local service freeze, customers were

process would be imposed in this docket and therefore did not request another *ex parte* meeting with respect to this proceeding.

[72] AT&T Comments at 145.

[73] *Id*. (*citing Cox Iowa Telecom, LLC v. Qwest Corporation*, Docket No. FCU-02-1 (rel. April 3, 2002) at 9).

[74] *See* Comments of Nebraska Public Service Commission, Concurring Opinion of Commissioner Anne C. Boyle at 2, WC Docket No. 02-148 (filed July 3, 2002).

[75] AT&T Comments at 145-46.

unable to switch to AT&T Broadband local service due to freezes on their accounts, even though the majority of customers asserted that they never authorized the freeze.[76]

Moreover, the Montana Public Service Commission ("Montana PSC") has found that Qwest uses illegal "win-back" schemes to recapture customers lost to its competitors.[77] Qwest offers "win-back" discounts to re-capture lost customers, despite the fact that it did not have a Commission approved tariff for the win-back offering. The Montana PSC recognized the anticompetitive nature of such activities:

> To allow Qwest to win back customers of CLECs by way of a competitive response tariff has the flavor of a revolving door: entrants may no sooner enter the market, than they are whisked out of the market. While the Commission seeks penalties in District Court for the alleged illegal manner by which Qwest re-captured customers the Commission has concerns about how such efforts may stifle competitive efforts by an infant CLEC industry otherwise bent on competing with Qwest.[78]

However, because the unlawful win-back scheme was revealed so late in the 271 process, the Montana PSC believed it could not address Qwest's conduct in the context of its 271 application, other than to express its concerns as to how Qwest's win-back activities may stifle competition.[79] The Commission must not be so constrained. Qwest's win-back activities is yet one more example of how the approval of Qwest's Application is wholly contrary to the public interest.

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76 *Id.*

77 *See* Evaluation of the Montana Public Service Commission ("Montana Comments") at 10 (*citing In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996*, Montana Public Service Commission, Docket No. D2000.5.70, Final Report on Qwest's Compliance with the Public Interest Requirement at 49 (issued July 8, 2002) ("*Montana Final Report*")).

78 *See Montana Final Report* at 49; Montana Comments at 10.

79 Montana Comments at 10.

While Qwest has been undertaking schemes designed to stifle the ability of carriers to compete in the local markets, the initial comments demonstrate that Qwest is trying to round out its monopoly by prematurely offering in-region, interLATA services in violation of section 271. Touch America and others – including Qwest's own auditors – have demonstrated that Qwest has violated and continues to violate section 271 by selling "lit capacity IRUs" and other in-region, interLATA services.[80] In fact, as discussed *supra*, through its recent Accounting Announcement, Qwest admits itself that it has been providing in-region, interLATA services since 1999 in the guise of "lit capacity IRUs."

Qwest's actions are nothing new. Qwest and its predecessor U S WEST have been found by this Commission to have violated section 271 on three previous occasions: (1) the provision of 1-800-4USWEST service;[81] (2) the teaming arrangement between U S WEST and Qwest;[82] and (3) the offering of National Directory Assistance.[83] More alarming, though, is the fact that Qwest continues to violate the restrictions imposed by section 271. As AT&T explains, subsequent to its merger with U S WEST and its purported divestiture of its in-region, interLATA assets to Touch America, Qwest undertook a concerted campaign to reacquire the most valued divested customers and to provide them, and others, with prohibited, in-region,

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[80] *See, e.g.,* AT&T Comments at 125-29.

[81] *See In the Matter of AT&T Corp. v. U S WEST Communications, Inc., and MCI Telecommunications Corp. v. U S WEST Communications, Inc.*, 16 FCC Rcd. 3574 (2001) (prohibiting 1-800-4USWEST service).

[82] *See In the Matter of AT&T Corp. v. Ameritech Corp. and Qwest Communications Corp.*, Memorandum Opinion and Order, 13 FCC Rcd. 21438 (1998), *aff'd sub nom.*, *U S WEST Communications, Inc. v. FCC*, 177 F.3d 1057 (D.C. Cir.), *cert. denied,* 528 U. S. 1188 (1999).

[83] *See MCI Telecommunications Corp. v. U S WEST Communications, Inc., and MCI Telecommunications Corp. v. Illinois Bell*, Memorandum Opinion and Order, DA 99-2479 (rel. Nov. 8, 1999) (declaring unlawful U S WEST's National Directory Assistance offering). *See also* AT&T Comments at 138-40.

interLATA services.[84] This activity was confirmed by Arthur Andersen in its post-divestiture compliance reports, where it found that Qwest employed at least three separate unlawful schemes: (1) it has used the Qwest-coined term "lit capacity IRU," which is nothing more than in-region, interLATA telecommunications services as defined by the Act (*i.e.*, transmission service); (2) it has provided interLATA services to customers under the guise of "corporate communications;" and (3) it has directly provided in-region, interLATA services "billed and branded as Qwest services."[85] In fact, Arthur Andersen's most recent audit reveals that Qwest's provision of illegal in-region, interLATA services is actually increasing.[86] Qwest's conduct has prompted AT&T to request the Minnesota Public Utilities Commission and the Arizona Corporation Commission, two of the few state commissions in the Qwest region that have not yet completed their 271 proceedings, to suspend their investigations of Qwest's 271 compliance pending an examination of Qwest's 271-prohibited activities.[87]

Further, as set forth in Touch America's initial comments, Qwest directed and controlled the so-called "independent" compliance audit process, essentially making a mockery of the post-divestiture compliance audit. The fact that Arthur Andersen was Qwest's corporate auditor during the period of time that it was also charged with performing the post-divestiture compliance audits, by itself, calls into question the "independence" of the compliance audits.[88]

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[84] AT&T Comments at 140-43.

[85] AT&T Comments at 140 (citing the Letter from Arthur Andersen LLP to Dorothy Attwood (June 6, 2001), Findings n. 2 and 7; Report of Independent Accountants, Att. 1 (April 16, 2001)). Qwest also attempts to hide its provision of prohibited in-region, interLATA services through the use of voice over Internet protocol and voice over asynchronous transfer mode technologies.

[86] *See* Report of Independent Accountants, Att. 1 (March 11, 2002).

[87] "AT&T Files to Halt Qwest Long-Distance Service in Minn., Ariz.," Dow Jones Newswire (August 12, 2002); http://online.wsj.com/article/0,,BT_CO_20020812_004773,00.html?mod=tel%2Dcts.

[88] As a result of its relationship with Qwest, Arthur Andersen approached the compliance audits as if Qwest, not the Commission, was its client.

The cozy nature of Qwest's and Arthur Andersen's relationship, such that Arthur Andersen routinely ran its reports by Qwest for review and comment before filing them with the Commission, wholly undermines any attempt to hold the audit out as "independent."[89] As a result of this tainted process, it is an acknowledgement of the magnitude of Qwest's 271 violations that Arthur Andersen even discovered and revealed the 271 violations.

The fact that Qwest has been violating section 271 for the past two years compels a finding that the Commission must now deny its 271 Application. Moreover, this determination is bolstered by the litany of other anticompetitive, anti-consumer and unlawful activities that Qwest has engaged in over the past several years, a sampling of which includes the following:

- Qwest recently agreed to pay the state of Colorado $1 million and reimburse customers who were victims of its deceptive sales practices, and further agreed to stop billing its customers for services not ordered (*i.e.*, cramming). In connection with the Colorado settlement, Qwest acknowledged that it had settled a similar complaint with the State of Oregon and is currently in settlement negotiations with two other states.[90]

- Qwest wrongfully denied competitors access to inside wiring and has disconnected competitors' equipment without reason or justification.[91]

- Qwest wrongfully refused to cooperatively test UNE-P service with competitors, despite its agreement and obligation to do so.[92]

- Qwest is under investigation by the Securities and Exchange Commission and the U.S. Attorney for the State of Colorado related to its past and future activities.

Given Qwest's anticompetitive and wrongful activities, and all of the allegations and accusations swirling around Qwest, the Commission must deny the Application.

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[89] Arthur Andersen did little more than report the results of the tests conceived and executed entirely by Qwest, thereby wholly failing to conduct the independent investigation which it was charged to do by the Commission.

[90] "Qwest pays fine for 'cramming' bills," Reuters, http://news.com.com/2110-1033-949621.html?tag=cdshrt (August 13, 2002).

E. Contrary to the filings of the state commissions, post-271 monitoring of Qwest is insufficient given Qwest's proclivity to evade regulators and its statutory obligations.

While recognizing that Qwest has failed in certain instances to meet the required performance indicators, or acknowledging the host of allegations of Qwest's unlawful or anticompetitive conduct, the state commissions nevertheless recommend approval of Qwest's Application, subject to continued monitoring of Qwest's activities. Contrary to the position of the state commissions, given Qwest's history of circumventing the law, regulators and competitors, the Commission must not leave the future of local competition in these states to future enforcement. Instead, Qwest must be made to comply with section 271 and other laws before being permitted to enter the in-region, interLATA market.

The recommendation of the state commissions to approve Qwest's Application is not surprising. The commissions have expended significant time and scarce resources over the past several years to evaluate Qwest's compliance with section 271 and therefore, understandably, do not want "last minute" revelations – such as the discovery of secret CLEC pacts, allegations of accounting irregularities, the initiation of criminal investigations and the introduction of deceptive consumer practices – to disturb their hard work. Accordingly, faced with Qwest's suspect activities and failure to meet performance metrics, the states either brush off the impact of Qwest's conduct or find that continued monitoring will ensure that Qwest does not continue its anticompetitive and unlawful conduct.

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91 *See* AT&T Comments at 137.
92 *Id*. at 136.

For instance, the Montana PSC recognized Qwest's poor manual processing, finding that "Qwest asserts that improved training and processes will remedy the situation, but, like KPMG, the Commission lacks evidence to determine whether Qwest's efforts have adequately addressed this problem."[93] Rather than require Qwest to affirmatively demonstrate that it properly processes manual orders, the Montana PSC only found that it "will be important on a going-forward basis for the Montana PSC to ensure that adequate performance measures are in place to monitor Qwest's manual order handing."[94] Similarly, although the Montana PSC acknowledged that Qwest's performance results related to wholesale billing accuracy and bill completeness indicate "a persistent problem existing in the billing area," it brushes off such concerns because these billing performance indicators are included in Qwest's performance assurance plan.[95] Likewise, although it acknowledged that KPMG was not able to determine whether Qwest had satisfied 7 out of 18 test criteria related to Qwest's OSS interfaces, in particular Qwest's stand-alone test environment, the Washington Utilities and Transportation Commission nevertheless signed off on Qwest's application.[96] The state regulators even extended this "continued enforcement" approach to dismiss Qwest's blatant anticompetitive conduct and the effect of Qwest's secret CLEC agreements.[97]

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93 *See* Montana Comments at 21.

94 *Id*. The Montana PSC also recognized that KPMG was unable to determine in some instances whether the performance data reported by Qwest for the pseudo-CLEC's transactions during the OSS test matched the results obtained by KPMG for the same transactions. *Id.* at 22. Nevertheless, the Montana PSC found that its "concern about the continued accuracy and reliability of Qwest's performance data should be addressed by the provisions of Qwest's performance assurance plan for auditing of the performance measurement system and for regularly scheduled plan reviews." *Id*.

95 *Id*. at 22-23.

96 *See* Comments of the Washington Utilities and Transportation Commission ("WUTC Comments") at 14-15. *See also* Montana Comments at 23.

97 *See* WUTC Comments at 32 (dismissing the impact of the secret agreements on the 271 process and concluding that "[i]f Qwest does discriminate against CLECs in the future, that treatment will come

While the state commissions are well-intentioned and skillful regulators, they likely do not have the resources to monitor, detect and deter Qwest's anticompetitive behavior. Qwest has repeatedly shown its adeptness at circumventing regulatory monitoring procedures. The Arthur Andersen audit was intended by the Commission to monitor Qwest's 271 activities and Qwest made a mockery of the audit process. Qwest is under civil and criminal investigation related to allegations that Qwest misstated its revenues for years without detection from federal regulators. Qwest was able to successfully conceal from regulators for years the secret agreements that it had entered into with competitors. Qwest has also been able to hide its 271-related activity, as well as its intention to continue its 271-prohibited activity post-divestiture, even when it was under the closest of scrutiny by the Commission in connection with its merger and post-merger compliance reviews. It is difficult to see, therefore, how the limited resources of the states will detect, much less investigate, punish and prevent such behavior.

Although the states do tremendous work given the resources that they have – in terms of both money and staff – Qwest may likely still prove to be too great a master of deception. Moreover, Qwest would hardly be a willing participant in on-going regulatory oversight proceedings. Even a regional, collaborative enforcement effort to monitor Qwest's post-entry activities and performance may prove to be too little. In sum, continued monitoring is not the silver bullet to support approval of the Application. Qwest must be made to meet its obligations *before* it is permitted into the in-region, interLATA market, which it has clearly failed to do.

III. CONCLUSION

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to light through the QPAP and could allow the FCC to withdraw any 271 authority granted to Qwest").

For the foregoing reasons, Qwest's Application must be denied. At a minimum, prior to permitting Qwest into the in-region, interLATA market, the Commission must require Qwest to divest itself of the in-region, interLATA assets that it was supposed to have divested to Touch America several years ago. In addition, given Qwest's history of circumventing the divestiture process, the Commission must require Qwest to submit to a genuinely independent and comprehensive audit for the purpose of ensuring that Qwest rightfully divests itself of its in-region, interLATA assets. In light of Qwest's predilection of backsliding on its promises and commitments, the Commission must also establish an effective enforcement team charged with ensuring that any post-271 complaints are resolved quickly and fairly by the Commission. For example, given that the record has revealed a number of billing disputes, the Commission should have a process in place to ensure that billing disputes may be quickly resolved and that Qwest is precluded from terminating service to carriers that properly dispute Qwest's erroneous and inadequate bills. In sum, Qwest should be reined in and brought back to the starting gate before being permitted to provide in-region, long distance services in the States of Montana, Utah, Washington and Wyoming and, at the same time, its markets should be made fully open to competition.

Respectfully submitted,

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August 26, 2002

CERTIFICATE OF SERVICE

I, Jane L. Hall, do hereby certify that on this 26th day of August, 2002, a copy of the foregoing Reply Comments filed on behalf of Touch America, in Docket No. 02-189, was served by U.S. Mail, postage prepaid, to the parties on the attached service list.

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